

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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Federal Communications Commission  
Office of Secretary

In the Matter of )  
IMPLEMENTATION OF THE ) CC Docket No. 96-128  
PAY TELEPHONE RECLASSIFICATION )  
AND COMPENSATION PROVISIONS OF THE )  
TELECOMMUNICATIONS ACT OF 1996 )

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COMMENT OF ROBERT M. BRILL, ESQ.

TO

NOTICE OF PROPOSED RULEMAKING  
Adopted: June 4, 1996 Released: June 6, 1996

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### **SUMMARY OF COMMENT**

This comment seeks to provide some brief observations with respect to the proposed rulemaking that the Federal Communications Commission has undertaken under the mandate of the Telecommunications Act of 1996. These comments are directed at the following topics: i) intrastate and interstate calls originated by payphones and the scope of calls covered (paras. 21-23 of the notice of rulemaking); ii) the entities required to pay compensation (paras. 24-28); iii) the ability of carriers to track calls from payphones, the administration of per-call compensation, and per call compensation amount (paras 29-39); iv) the reclassification of incumbent LEC-owned payphones (Paras 41-56); v) the establishment of public interest payphones (paras. 76-82); and vi) protecting section 276 of the 1996 Act from barriers to entry erected by state and local governments.

This Comment, while generally in support of the Commission's preliminary views, recommends that the Commission follow wherever and whenever possible an approach that permits the providers of payphone service a free-market based standard for compensation.

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## **INTRODUCTION**

I represent private payphone owners ("PPOs") located in the New York Metropolitan area, a corporation engaged in the development of a wireless payphone, and a lender to PPOs. I respectfully submit this comment with respect to the above-captioned rulemaking (the "Payphone Rulemaking").

The Telecommunications Act of 1996 (the "1996 Act") broadly and clearly recognized PPOs as legitimate forces in the telecommunications industry. One clear rule predominates, which should guide this Commission in its implementation of the 1996 Act -- in the future, all payphone service providers ("PSPs"), whether PPOs or LECs (both independents and Bell Operating companies ("BOCs")), should be entitled to recover a free market based return on investment with the roles of all regulators, particularly those of the states and localities, kept to a minimum. This rule is applicable to all aspects of the Payphone Rulemaking.

## **INTRASTATE AND INTERSTATE CALLS ORIGINATED BY PAYPHONES** **SCOPE OF CALLS COVERED (PARAS. 21-23)**

It is submitted that of the options described for public comment, one (a nationwide rate) and three (permitting the rates to be set by the states) are problematic. However, a variant of option two (federal guidelines) would best serve the implementation of the 1996 Act. A national rate would be problematic as the costs of provisioning payphone services are not the same throughout

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the nation, and some of the costs are not easily quantifiable. (For example, the costs to PPOs of obtaining and maintaining franchises in New York City pursuant to its new franchise and anti-graffiti legislation may be very different from maintaining payphones in Butte, Montana.) Moreover, for the Commission to delve into the realm of regional rate-making on an annual or biennial basis would require resources beyond that which is presently available to the Commission. Having the States' regulate any aspect of payphone rates would be a disaster. The regulators of the States are more prone to protect the interests of the BOCs and RBOCs, or to substitute their value judgment for that of the free market as to what the costs of providing payphone service are and what is a reasonable profit for the provider of payphone service. Many State public service commissions have a tremendous antipathy to PPOs because such regulators are unused to dealing with entrepreneurs and the realities of a free market. In addition, such regulators are unlikely to resist the deregulation of payphone pricing, if the public, unused to the initial price rises that will accompany the removal of artificial price constraints, raises public protest. With the exception of the progressive New York State Public Service Commission, there is no evidence that state regulators will be amenable to implementing the principles of Section 276 of the 1996 Act.

The preferable frame-work would be for this Commission to establish a national floor that reflects a basic assessment of a national average cost of the provisioning of service (which would include a profit factor). This assessment could be based on the wholesale producer price index ("WPPI") and could vary on an annual or biennial basis as the WPPI varies. The Commission should also provide that state regulators must permit the per call prices to vary upward or downward

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within parameters so as to permit market conditions and costs within a state to be reflected in the charges for a completed call. Thus, option two should be preferred.

**ENTITIES REQUIRED TO PAY COMPENSATION (PARAS. 24-28)**

The framework formulated by the Commission in this regard is appropriate. The basic standard should be that so long as access is completed, someone must provide the payphone service providers ("PSPs") compensation. If such a standard is set, then the mission of the 1996 Act will be implemented. In this regard, the Commission should note that in the case of a calling card call, the completion of the access to the card service provider must be considered the "call."

**ABILITY OF CARRIERS TO TRACK CALLS FROM PAYPHONES,  
ADMINISTRATION OF PER-CALL COMPENSATION, and PER CALL  
COMPENSATION AMOUNT (PARAS. 29-39)**

The emphasis on IXC in tracking all compensated calls may overlook calls eligible for compensation by non-IXC, such as LECs. Thus, a comprehensive review of what is exactly occurring in the market and the technologies presently available and soon available is in order.

With respect to the providing of interim compensation (para. 39), the Commission should be cognizant that when there is a final rule promulgated, there should be an accurate "true-up." This would permit equity to be fully established in and for the short term and future.

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**RECLASSIFICATION OF INCUMBENT LEC-OWNED PAYPHONES (PARAS. 41-56)**

The Commission must be vigorous in ensuring that the former monopolist (the incumbent LEC) does not use advantages developed as a monopolist to set the stage for its post-1996 Act payphone business. The incumbent LEC should not be allowed financial and accounting benefits that makes it more competitive than its formerly embattled competitors. Furthermore, certain incumbent LECs have received in the years prior to the enactment of the 1996 Act express recognition by States and Localities, which were denied to PPOs. This recognition has translated to advantageous site locations. For example, the City of New York in the last 14 years has only recognized NYNEX's right to site payphones at the curb. PPOs were denied this right. Under the new New York City payphone Franchise and regulatory frame-work this competitive advantage has been preserved. Such an overwhelming advantage must be factored into the Commission's analysis of how the incumbent LEC may proceed in the post-1996 Act world. Perhaps some divestiture of sites to PPOs is in order.

**ESTABLISHMENT OF PUBLIC INTEREST PAYPHONES (PARAS. 76-82)**

Regardless of the merits of public interest payphones ("PIPs"), the same basic rule discussed above should apply with respect to PIPs. PSPs should receive fair compensation for installing, maintaining, and operating PIPs. Such compensation should include extraordinary measures

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associated with a PIP, such as vandalism, graffiti removal, and difficulties in servicing the PIP due to location. The Commission should be cognizant that localities and state governments, as well as the federal government, have an array of incentives to compensate for PIPs, including utility tax credits, sales tax credits, corporate income tax credits, franchise and permit fee refunds or discounts at other locations. In the end, the Commission should balance the forcing of PSPs to provide PIPs against the incentives that all government entities could and should provide for the providing of such a public service by for profit entities.

**PROTECTING SECTION 276 FROM BARRIERS TO ENTRY ERECTED BY STATE  
AND LOCAL GOVERNMENTS**

The Commission must cognizant that there is still a potential for the governments of states and localities to pass legislation and regulations with respect to payphones that erects barriers to entry. Even though such barriers would be prohibited by Section 253, the states and local governments may be intentionally neglectful of their duties and obligations under the 1996 Act with regard to payphones. For example, New York City's new franchise authorizing resolution prohibits PPOs owning less than 25 payphones from obtaining a franchise (hence, authorization) to place payphones on the streets of the City. In addition, under the franchise resolution, New York City government officials will determine if a PPO has the economic, financial, managerial, and technological skills and abilities to be permitted to compete in the provisioning of payphone services on the streets of New York. Finally, New York has concluded that this franchise will be open for



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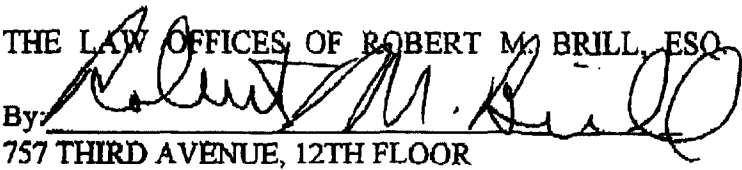
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response for a finite amount of time. In sum, New York's government and bureaucracy has determined, despite what the 1996 Act commands and suggests, to substitute its value judgment for that of the market place as to what entities may compete with regard to the provisioning of payphone service on the streets of the City of New York. Similar restrictions have been developed around the nation. The Commission must in clear and certain terms prevent the erection of such barriers to entry and enforced regulation, which the 1996 Act prevents and prohibits.

### CONCLUSION

For all these reasons, it is respectfully submitted that the Commission should apply a basic standard with regards to the implementation of Section 276 of the 1996 Act that PSPs should receive free-market based compensation for the use of their property and the provisioning of payphone service. Barriers to entry erected by state and local governments should not be permitted to interfere with the implementation of Section 276 and the creating of a level playing field in the market for payphone service.

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